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NO.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

MICHAEL A. RUSH,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Questions Presented

1. Where there was a dispute over the accuracy of a crucial part of the court reporter's notes of testimony, was the Petitioner denied a fair trial by the refusal of trial court to advise the jury of the potential inaccuracy where the jury had requested a reading of that part of the testimony?

2. Where the court refused to instruct the jury that before a particular defendant could be found guilty of the crime of conspiracy, it must be demonstrated that the defendant in some sense, promoted the venture himself and had a stake in its outcome. Was the defendant denied a fair trial?

3. Was the Petitioner wrongfully convicted of a charge of conspiracy where he was not proven to have any stake in the outcome of the alleged common venture.

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vs.

UNITED STATES OF AMERICA,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Michael A. Rush, Petitioner, prays that a Writ of Certiorari issue to review the judgment from the United States Court of Appeals for the Second Circuit entered in the above entitled case on March 20, 1981 (17a).

Opinion Below

The opinion of the Court of Appeals for the Second Circuit is not yet reported and is printed in full as Appendix A.

Jurisdiction

The Judgment of the Second Circuit Court of Appeals was entered on March 20, 1981. The jurisdiction of this court is invoked under Title 28, United States Code, Section 1254(1).

Constitutional Provisions Involved

Fifth Amendment to the Constitution of the United States (reprinted as Appendix D).

Statute Involved

Title 28, United States Code, Section 2106; Title 21; United States Code, Section 841(a)(1); Title 28, United States Code, Section 753(b).*

Statement of the Case

The Petitioner, Michael A. Rush, was indicted by a federal grand jury in the District of Connecticut, charged in one count with conspiracy to import marijuana into the United States with intent to distribute it in violation of Title 21, United States Code, Section 841(a)(1). He was tried before Hon. T.F. Gilroy Daly, District Judge and a jury. The jury returned a verdict of guilty. The Petitioner, Rush, who was sentenced to three years imprisonment and to pay a fine of $15,000.00, appealed the judgment. The Court of Appeals for the Second Circuit affirmed the judgment and filed a per curiam opinion to which one member of the panel vigorously dissented. (Appendix A). A petition for rehearing was timely filed together with a suggestion in the alternative for consolidation en banc. The petition was denied April 27, 1981 (18a).

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* Reprinted as Appendix E.

Statement of the Reasons for Granting the Writ

1. During the course of the jury deliberations which consumed almost two days, after trial which had taken only 2½ days to complete, the jury made several requests for a re-reading of the testimony of certain witnesses. The testimony of two witnesses, Myers and Hall, called by the Government, who offered the only direct testimony concerning the alleged guilty knowledge of the Petitioner, Rush, was re-read to the jury at its request.

During a conference in chambers, attended by counsel for the Government, counsel for the defendant, the trial judge and the court reporter, called for the purpose of identifying the testimony requested by the jury, the court reporter read his notes aloud. During the review, the following question and answer from the direct examination of the witness Hall were read by the reporter:

> "Q. Can you recall any specific conversation between you and Dr. Rush about what the money had been used for? (objection omitted)
>
> A. Yes.
>
> Q. Would you tell the ladies and gentlemen of the jury what specific conversation you recall?
>
> A. That we had in fact made a successful run to the Bahamas and brought in a little bit, enough to pay him and to pay off the shop, and so forth. You know. That kind of talk, back—you know. But there was no long, lengthy—and the reason I says I didn't know, because I don't remember exactly *whether* we said it you know". (emphasis supplied)

After the chamber conference was terminated, the prosecutor went back to her office to talk to the investigative agent about their joint recollection of the testimony and

to consult their notes. They agreed between themselves that the word actually used by Hall to introduce the final clause of his answer was not "whether" but "when"—a version decidedly more favorable to the prosecution's case. The prosecutor thereafter informed the court reporter of her determination.

When the court reporter read the testimony to the jury, he used the word "when" rather than the word "whether". Defense counsel interposed an objection to the change made by the reporter and the trial judge announced that in view of the fact that the court reporter had interpreted his own notes to indicate that the proper word was "when", that such interpretation was "dispositive of it, so far as I am concerned" (12a).*

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* Judge Friendly in his dissent in the Court of Appeals described succinctly the foundation of the dispute (11a-12a).

After the reading, defense counsel sought an explanation of why the reporter had changed his interpretation of his notes. Following some off-the-record discussion the court ascertained that under the reporter's system the letters "WH" mean "when" and the letters "WHR" mean "whether". He asked the reporter what appeared in his notes, and the latter responded "when". In fact what appeared was "WHR" with the bottom part of the R almost entirely missing and the upper part much less strongly inked than in portions of the tape preceding or following the disputed symbol where R appeared alone or with other letters. What no one brought out, although this would have taken only a few seconds, is that the letters in question are so located on the keyboard that the reporter could have meant to type either "whether" or "when". The letters are arranged as follows:

H

W R

(Footnote continued on following page)

Shortly thereafter, the jury again requested certain of the testimony. In a note sent to the judge, the jury said:

> "Hall's testimony is becoming very crucial, some of us seem to recall that in cross-examination he reversed himself and specifically (sic) excluded Dr. Rush from the group that knew the use to which the borrowed money was to be put."

A few minutes later the jury was returned to the court room and the reporter read Hall's entire cross-examination to them. The jury again retired for further deliberation.

At this point, defense counsel again raised the question of the dispute concerning Hall's direct testimony. After detailing his reason for believing that it was a legitimate controversy, defense counsel requested that the jury be instructed that there might be a discrepancy as to that particular portion of Hall's testimony. The trial court disposed of the motion, apparently relying upon the provision of Title 28, U.S.C., Section 753(b) which provides that

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(Footnote continued from preceding page)

The W is produced by a stroke of the middle finger of the left hand. The H, when typed without the R, is produced by a stroke of the index finger of the left hand. To type the H and R in one symbol such as "WHR", the reporter stroke both letters simultaneously with his index finger, the rows of keys being close enough together to permit his finger to bridge the gap between the two keys. The arrangement of the letters on the keyboard and the way in which they are supposed to be struck are seemingly consistent with two possibilities: One is that the reporter meant to strike only the H but that his index finger also caught the R; the other is that he meant to stroke both the H and the R but that his single finger applied inadequate pressure to the R. The judge nevertheless announced that the reporter's statement was "dispositive of it, so far as I am concerned".

> "The transcript in the case certified by the reporter shall be deemed prima facie a correct statement of the testimony taken and the proceedings had."

The jury later again requested a reading of "the balance of Hall's testimony in full—the direct and indirect." The testimony was read again and the word "when" was used in the disputed answer rather than the word "whether". Defense counsel again objected and the judge adhered to his earlier ruling. Shortly thereafter the jury returned with a verdict of guilty.

The disputed answer was in a crucial and important area of the case. The issues which were before the court were whether Rush had supplied money to others named in the indictment merely for the sake of making an exorbitant return upon his investment or whether he had made the loan with the purpose and intent of enabling the co-defendant to smuggle marijuana into the United States and thereby realize the profits needed to make the exorbitant return to Rush possible. It was the position of Rush in the trial court that it was not enough for the government to prove that he had reason to know that the money was to be used for an illegal purpose, but that the government was obliged in addition to prove that he intended to "further, promote and cooperate" in the illegal venture. *Direct Sales Co.* v. *United States*, 391 U.S. 703, 711 (1943). There is no question that the jury regarded this crucial area as most important to their deliberations.

In this case, the jury demonstrated by its demand for the reading and re-reading particularly of the testimony of the witness, Hall, that they were concerned about coming to a proper determination of the facts. There is little doubt that the matter of acceeding to the jury requests for all or part of the testimony of certain witnesses is well within

the discretion of the trial judge. *United States* v. *Chrzanowski,* 502 F.2nd 573 (3rd Cir. 1974); *United States* v. *Pollak,* 474 F.2nd 828 (2nd Cir. 1973) on remand 364 F. Supp. 1047 (S.D.N.Y. 1973) Aff'd. 492 F.2nd 1237 (2nd Cir. 1974). Of course, it is also logical that if under our system of trial the jury is to be considered intelligent enough to be entrusted with the power of decision, it must be assumed that the jury has sense enough to ask to have its memory stimulated or refreshed as to those portions of testimony about which there is doubt or disagreement. See *United States* v. *Rabb,* 453 F.2nd 1012 (3rd Cir. 1958). Congress has recognized the fact that it is of crucial importance that a complete transcript of a trial in a criminal case be available. Title 28, United States Code, Section 753(b), See *Hard* v. *United States,* 375 U.S. 277 (1964) rehearing denied 376 U.S. 936 (1964). The foregoing statute which also provides that any transcript certified by the reporter shall be deemed to be a prima facie correct statement of the testimony has never been deemed to make the court reporter's certification incontrovertable or to authorize the trial judge to withhold knowledge of a genuine dispute concerning the accuracy of the record from the jury. *C.F. United States* v. *Smith,* 562 F.2nd 619 (10th Cir. 1977), *United States* v. *Smith,* 433 F.2nd 149 (5th Cir. 1970), *United States* v. *Carter,* 347 F.2nd 220 (2nd Cir. 1955) Cert.Den. 382 U.S. 888 (1966).

The argument related to the transcript dispute drives directly into the very foundation of the jury verdict. It might well be speculated that because of the admitted fragile nature of Hall's recollection that had the answer in issue been read to the jury substituting the word "whether" for the word "when" the jury very well could have come to a different verdict. A careful reading of the transcript of the testimony of the only witnesses, Hall and Myer, who related the instances where Rush was allegedly

informed of the nature of the activities to be financed by the money borrowed from him reveals that the testimony was not cut and dried but was in general unclear and equivocal.

This court should exercise supervisory power over the administration of justice in the federal court, and should in this case act to prevent the petitioner Rush from being deprived of his liberty without due process of law.

2. Pursuant to the provisions of Rule 30 of the Rules of Criminal Procedure, the defendant filed with the trial court written requests that the court instruct the jury on the law as set forth in those requests. Subsequently, during the course of the trial and prior to the closing argument, the court informed counsel for the defendant that certain of the requests would not be charged.

The defense was based upon the legal principal that in order to find the petitioner Rush guilty of a conspiracy to import and distribute marijuana, the jury must find not only that he knew of the objectives of the conspiracy, but that he had a stake in the illegal venture which he furthered, cooperated in and promoted as his own. See *U ited States* v. *Falcone,* 311 U.S. 205 (1941) *Aff'g.* 109 F.2nd 579 (2nd Cir. 1940), *Direct Sales Co.* v. *United States,* 391 U.S. 703 (1943).

In his efforts to establish that defense, the petitioner Rush denied on the witness stand any knowledge of the purpose for which certain monies were borrowed from him by a co-defendant Hall. He further asserted that the property mortgaged as security for the loans was valued at far more than the amount of the loans. That fact was attested to by the witnesses for the government. Finally, it was contended by Rush that it mattered little whether he knew of the purpose for which the monies were going to be used since he had no interest in whether the con-

spiracy was successful in achieving its aims and objectives. For that reason, Rush requested that the court instruct the jury as follows:

> "In order for you to find any defendant guilty under the conspiracy count, you must find the government has established the following essential elements beyond a reasonable doubt as to that defendant.
>
> First, the existence of the conspiracy as charged in the Indictment. Obviously, before you can find anybody guilty of conspiracy, you have to find that there was a conspiracy.
>
> Second, that as to any particular defendant he knowingly, and wilfully associated himself with the conspiracy and demonstrated a concert of purpose in that he in some sense promoted the venture himself and made it his own and had a stake in its success."

It should be noted that at a conference under the provisions of Rule 30, counsel for the defendant suggested that the court consider an amendment to the request:

> "Or if 'stake in the success' shouldn't be the word . . . 'a stake in the outcome' I suggest."

Counsel went on to state that he would object vehemently to any language short of charging a stake in the venture or a stake in the outcome. Again, he objected after the charge to the jury when the court refused to charge as requested.

The requested instructions were the key to the defense and the failure of the court to include a specific direction to the jury that in order to find the defendant guilty, they must find that he had in a sense promoted the venture

himself and made it his own and therefore had a stake in the outcome of the conspiracy, made it difficult if not impossible for the jury to consider properly the issue of Rush's involvement.

This Court has determined that the Constitution requires proof beyond a reasonable doubt of every fact necessary to constitute the crime. *In re: Winship,* 397, U.S. 358, 364 (1970) and the failure to instruct the jury on an essential element in the complex issue of the defendant's involvement in a conspiracy created an impermissible risk that the jury would not make the findings that the Constitution requires. *Henderson* v. *Kibbe,* 321 U.S. 145, 151 (1977).

The refusal of the trial court to use the requested language served to deny to the petitioner, Rush, a fair consideration and he was thereby denied a fair trial.

3. The sole charge against the defendant was one of conspiracy. The issues contested at the trial were few. First, the petitioner Rush denied any knowledge of the existence of the conspiracy and second, he took the position that even if he had known of its existence, he did not participate in it as a co-conspirator but merely furnished money in the form of a loan which was fully secured by very valuable real estate.

This court in 1957 reminded the prosecutorial agencies that the court had repeatedly warned that it would view with disfavor attempts to broaden the already pervasive and wide-sweeping nets of conspiracy prosecutions. *Gruenwald* v. *United States,* 353 U.S. 391, 404 (1957). In spite of the foregoing admonition, the Department of Justice has continued down the path toward fortifying the observation of the Court of Appeals for the 2nd Circuit in

Harrison v. *United States,* 7 F.2nd 259, 263 (2nd Cir. 1925) that the use of the conspiracy charge has become the "darling of the modern prosecutors nursery".

The crime of conspiracy is the illegitimate agreement and the agreement itself is the crime. Justice Holmes said many years ago "conspiracy is the partnership in criminal purposes", *United States* v. *Kissell,* 218 U.S. 601 (1910). In a very real sense therefore, the extent of the agreement is the most significant issue to be decided in a conspiracy trial since the agreement is the basis of the criminal liability, if any. The fundamental fact is that the agreement which embraces the charged objective must be proved clearly in order to support a prosecution. *United States* v. *Aviles,* 274 F.2nd 179 (2nd Cir. 1960). In order to support a conviction for a conspiracy, the evidence produced and the reasonable inferences drawn therefrom must state knowledge of the conspiracy and intent to join the group and an intent to agree. *United States* v. *Bufalino,* 285 F.2nd 408 (2nd Cir. 1960) reversing *United States* v. *Bonnanno,* 177 F.Supp. 106 (S.D.N.Y. 1959); *Cleaver* v. *United States,* 238 F.2nd 766 (10th Cir. 1956).

The conspiracy as proved at the trial by the government was shown to have pre-existed any involvement by the petitioner, Rush. It is most important to consider the extent of the common goals, if any, under which the other parties operated and to which the petitioner Rush may be deemed to have subscribed. What were the intentions of the parties? In essence, in a conspiracy prosecution there are two different types of intent which need be found. First, the basic intent by accused to enter into an agreement with one or more of the others to violate a specific law (or laws of the United States). Second, the intent by the accused to accomplish or effectuate that objective. See *United States* v. *U.S. Gypsum Co.,* 438 U.S. 422 (1978). Drawing

all inferences favorable to the government it is submitted that the evidence did not prove either of the above stated levels of intent on the part of the petitioner Rush. The evidence showed that it was the intent of petitioner Rush to profit perhaps exorbitantly from a loan. At worst, the evidence demonstrates only that he intended to furnish the instrumentality by which the others would undertake to violate the law. There was no evidence he intended to import or distribute marijuana or that he cared whether the others were successful in their importation or distribution. In *United States* v. *Falcone,* 109 F.2nd 579 (2nd Cir. 1940) Aff'd. 311 U.S. 205 (1941), Judge Leonard Hand of the 2nd Circuit Court of Appeals speaking for that court established a rule which we submit still properly defines the law governing the participation in a conspiracy. It provides that it is not enough that a person does not forego an activity the fruits of which he knows others will use in an unlawful activity; he must "promote their venture himself, make it his own, have a stake in its outcome". *United States* v. *Falcone, supra.* A few years after the *Falcone* case, this court in *Direct Sales Co.* v. *United States,* 319 U.S. 703 (1943) dealing with an argument made by a corporate defendant that its case was identical to the case of *United States* v. *Falcone, supra,* rejected that argument. The court stated that Direct Sales a drug supplier, was aware that its customer was distributing illegally, but nevertheless, continued to supply the drugs and encouraged the sale thereof in the effort to incur greater profits. Unlike the defendant in *Direct Sales,* the petitioner herein engaged in what can be classified as a single transaction with no concern to encourage the further activities of his "customer".

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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[Appendices Follow]

APPENDIX A

Opinion of the United States Court of Appeals for the Second Circuit

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 889—September Term, 1980

(Argued March 3, 1981 Decided March 20, 1981)

Docket No. 80-1446

UNITED STATES OF AMERICA,

Appellee,

—*v.*—

MICHAEL A. RUSH,

Appellant.

BEFORE:

FRIENDLY, MULLIGAN and TIMBERS,

Circuit Judges.

Upon appeal from a judgment of conviction, after jury trial, entered in the District of Connecticut, T.F. Gilroy Daly, *District Judge,* of conspiracy to violate the federal narcotics laws, the Court of Appeals affirmed for the reasons set forth in this opinion.

Affirmed.

Appendix A

PETER A. CLARK, New Haven, Conn. (Richard Blumenthal, United States Attorney, and Holly B. Fitzsimmons, Assistant United States Attorney, New Haven, Conn., on the brief) *for Appellee.*

S.M. CHRIS FRANZBLAU, Newark, N.J. (Franzblau & Falkin, Newark, N.J., on the brief) *for Appellant.*

PER CURIAM:

Appellant Michael Rush was charged with a single count of conspiracy to import marijuana into the United States with intent to distribute it in violation of 21 U.S.C. § 841 (a)(1) (1976). He was tried before T.F. Gilroy Daly, *District Judge,* and a jury. The jury returned a verdict of guilty. From the judgment entered thereon, appellant has taken this appeal. We affirm.

I.

The government claimed, and the jury found, that appellant, a medical doctor, lent a total of $25,000 in two transactions to his co-conspirators to finance the purchases of marijuana from sources in the Bahamas. Appellant's co-conspirators repaid the principal amount of the loan and $15,000 in interest. The proceeds of the loan were used to import marijuana on at least three occasions. The marijuana was distributed in Florida.

Appellant contended at trial that, at the time he made the loan, he had knowledge of the use to which the loan proceeds were to be put. On appeal, appellant conceded that he had such knowledge, but asserted three further

contentions. The questions before us on appeal are (1) whether, even assuming there was probative evidence of appellant's guilty knowledge, he properly could be found to have become a "part" of the conspiracy; (2) whether the jury instructions were proper; and (3) whether the district court erred in refusing to give an alternate reading of the trial transcript to the jury or in refusing to disclose to the jury that there was a question as to the accuracy of the transcript. We shall discuss each of these questions in turn.

II.

Appellant's argument that he could not be convicted even though he was "fully aware of the scope and object of the conspiracy" is neither novel nor compelling.

Appellant argues that he never became a "part" of the conspiracy because, under the conspiratorial agreement, he was not to share in the proceeds of the unlawful venture and because his loans to the co-conspirators were fully secured. These facts are said to establish that appellant had only the intent of a lender to profit from a loan transaction and lacked the intent of a criminal to enter into or to effectuate an agreement to violate the laws of the United States. In support of this analysis, appellant relies upon *United States* v. *Falcone,* 109 F.2d 579 (2 Cir. 1940) (L. Hand, J.), *aff'd,* 311 U.S. 205 (1941). The Court held in *Falcone* that a jobber in the sugar trade could not be found guilty of conspiring to manufacture illegal liquor merely because he knew that the wholesaler to whom he sold the sugar in turn would deliver it to illegal distillers. This Court on several occasions has stressed that *Falcone* should be limited "to its strict facts—the case of a supplier of goods innocent in them-

selves, who does nothing but sell those goods to a purchaser who, to the supplier's knowledge, intends to and does use them in the furtherance of an illegal conspiracy." *United States* v. *Tramaglino,* 197 F.2d 928, 930 (2 Cir.), *cert. denied,* 344 U.S. 864 (1952); *see United States* v. *Piampiano,* 271 F.2d 273, 274-75 (2 Cir. 1959). *See also Direct Sales Co.* v. *United States,* 319 U.S. 703, 711, 713 (1943).

Falcone is not relevant here at all. Rush was not a supplier of goods or commodities which were to be utilized in an illegal venture; he supplied the cash which made the illegal venture possible.[1] Rush was a podiatrist and a partner of one Leroy Myers in the Emerald Hills Flying Service. He was not a money lender. He became one only to finance this venture at an exorbitant and usurious profit, knowing full well the source of the proceeds. He acted in a secretive and clandestine fashion, obtaining first a mortgage note reflecting a 10% rate of interest. That note was recorded. A second mortgage note for $10,000 required payment of $20,000 in five days. For obvious reasons that note was never filed. In *United States* v. *Piampiano, supra,* a fruit and vegetable dealer departed from his usual business to supply sugar to an illicit distillery. This Court found *Falcone* inapplicable since the defendant deviated from his usual line of business to deal in a commodity almost entirely new to him in a manner inconsistent with his previous business transactions, *United States* v. *Piampiano, supra,* 271 F.2d at 274. Rush here embarked upon a new line of business not only with full knowledge

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[1] Money furnished to facilitate violations of the federal narcotics laws becomes forfeit to the United States. 21 U.S.C. §881(a)(6), 1976.

of its illicit nature but through a clandestine method devised to protect him from its consequences.[2]

We hold that there was sufficient evidence from which a properly instructed jury could find that appellant knew the borrowers' "intended illegal use", *Direct Sales Co.* v. *United States, supra,* 319 U.S. at 711, and that by making the loans he "intend[ed] to further, promote and cooperate in" their scheme. *Id.* "This intent, when given effect by an overt act, is the gist of conspiracy." *Id.* Appellant's attempt to distinguish the instant case on the ground that he had no "stake" in the illegal enterprise is unpersuasive. The role of appellant here and that of the Direct Sales Co. were equivalent in their encouragement of illegal activity on the part of those with whom they dealt.

III.

Appellant further claims that the district court committed reversible error in refusing to charge the jury in accordance with appellant's proposed instruction. That charge would have required the jury to apply the "stake in the interest" test set forth in *United States* v. *Falcone, supra,* 109 F.2d at 581, to determine whether appellant was a participant in the conspiracy.

Although the trial court is not required to use the "stake" language, *United States* v. *Salcido-Medina,* 483

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[2] The surreptitious nature of the loans was evidenced not only by Rush's omission to record the usurious mortgage note but also by his method of withdrawal and replenishment from his bank account. He withdrew a total of $20,000 net to finance the loans, and, although his profits amounted to $40,000, he redeposited only $10,000 so as to show no additional income.

F.2d 162, 164-65 (9 Cir.), *cert. denied,* 414 U.S. 1070 (1973), the court should instruct the jury that, in order to convict, it must find that the defendant intended to further or promote the illicit scheme.[3] Here, the district court's charge, although colloquial, did contain the necessary elements: agreement, common objective, some act in furtherance of the objective, and knowledge. We hold that the instruction was adequate and comprehensive to the jury. We do wish to emphasize once again, however, the importance in this critical area of adhering to judicially approved charges that are carefully drawn to aid the jury in focusing on critical issues.[4]

IV.

The final claim on appeal concerns the reading to the jury of a portion of the trial transcript. When the jury first requested that portions of testimony be read, the judge brought the parties, their counsel, and the court reporter into his chambers to review the portions to be

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[3] *See, e.g., Direct Sales Co.* v. *United States,* 319 U.S. 703, 711 (1943); *United States* v. *Provenzano,* 615 F.2d 37, 45 (2 Cir.), *cert. denied,* 446 U.S. 953 (1980); *United States* v. *Guillette,* 547 F.2d 743, 750-51 (2 Cir.), *cert. denied,* 434 U.S. 839 (1976); *United States* v. *Cirillo,* 499 F.2d 872, 883 (2 Cir.), *cert. denied,* 419 U.S. 1056 (1974); and Model Penal Code § 5.03 (Tent. Draft No. 10, 1960).

[4] *Peymann* v. *Perini Corp.,* 507 F.2d 1318, 1324 n.2 (1 Cir. 1974), *cert. denied,* 421 U.S. 914 (1975); *United States* v. *Montijo,* 424 F.2d 207, 208 (1 Cir.), *cert. denied,* 400 U.S. 836 (1970); *McMillen* v. *United States,* 386 F.2d 29, 32 (1 Cir. 1967), *cert. denied,* 390 U.S. 1031 (1968); *Schlinsley* v. *United States,* 379 F.2d 735, 740 n.3 (1 Cir.), *cert. denied,* 389 U.S. 920 (1967).".

read. The reporter read a statement of one of the co-conspirators recalling a conversation with another co-conspirator about drugs as ". . . I don't remember exactly *whether* we said it. . . ." (emphasis added). The next day the judge informed defense counsel, out of hearing of the jury, that the court reporter had misread his notes and that the correct words were ". . . I don't remember exactly *when* we said it. . . ." (emphasis added). Over objection, the record was read to the jury in its corrected form. The judge refused to instruct the jury that a difference had arisen and that the jury should rely on its own recollection.

We reject appellant's attempt to raise to the level of reversible error the trial judge's decision, after consultation with the court reporter and defense counsel, to follow the reporter's unequivocal interpretation of his own notes. "The transcript in any case certified by the reporter shall be deemed prima facie a correct statement of the testimony taken and proceedings had," 28 U.S.C. § 753(b) 1976. It is plain that error may occur in compiling a transcript no matter how expert or experienced the reporter. In that instance it is appropriate for him to review the tapes and determine if indeed they were mistranscribed. When as here the judge and opposing counsel are apprised of the situation, the determination of the judge on this question of fact normally should terminate the issue.

In any event, we cannot agree with our dissenting brother that this testimony was that crucial. There was ample other testimony on the direct examination of both Hall and Myers that Rush was aware of the illegal purpose for which the money was to be used—"the doper business." There also was testimony that Mrs. Rush was

upset and was anxious that her husband withdraw from the venture. Moreover, Rush's unsuccessful attempt to masquerade his participation as a legitimate business transaction utilizing mortgage notes prepared by his cousin, a lawyer, emphasized his effort to escape liability and thus his guilty knowledge. In fact in his reply brief Rush concedes that he knew the money was to be utilized for the purpose of purchasing marijuana in the Bahamas.

In fact, had the word used by Hall on direct been "whether" rather than "when," it is not understandable why counsel for the appellant would not have seized upon the issue on cross examination. He did not. The main thrust of Hall's cross examination was his motivation for testifying in view of his cooperation with the government. It is further significant that the disputed testimony referred to a conversation which took place *after* the first successful trip to the Bahamas. Since there was undisputed testimony that Rush knew the purpose of the loan *prior* to the trip, whether or not the issue was again discussed, is not crucial to the government's case. Hall did testify that prior to the loan he told Rush that the money was to be used to purchase marijuana. He also testified that after Hall's arrest Rush and he had agreed that Hall would falsely tell the authorities that $40,000 was borrowed to purchase a diesel truck, thus furnishing more proof of appellant's awareness.

We find that the evidence fully supports the conviction and that there was no reversible error. The mandate shall issue forthwith.

Affirmed.

Appendix A

FRIENDLY, *Circuit Judge,* dissenting:

In my view affirmance of this conviction is not a proper exercise of the power, conferred up us by 28 U.S.C. § 2106, to "require such further proceedings to be had as may be just under the circumstances."

From the outset of this two and a half day trial the crucial question was whether Dr. Rush had supplied money to the others named in the indictment merely for the sake of making an exorbitant return or whether he had done so with the purpose and intent of enabling them to smuggle marijuana into the United States and thereby realize the profits needed to make the exorbitant return possible. It was not enough for the Government to prove that Dr. Rush had reason to know that the money was to be used for an illegal purpose; the Government was obliged to prove that he intended "to further, promote and cooperate" in the illegal venture. *Direct Sales Co.* v. *United States,* 319 U.S. 703, 711 (1943). The record demonstrates that the jury regarded this rather elusive distinction as a close question. Having commenced its deliberations at 2:30 P.M. on October 2, 1980, it reported less than two hours later that it was hung. Shortly after having been instructed to continue to deliberate, it requested the transcript of testimony given by Government witness Hall. The judge, having ascertained that a reading of the testimony would take about two hours, asked the jury whether it wished to hear Hall's entire testimony. After retiring to the jury room to deliberate briefly, the jury returned shortly after 5 P.M. to request a reading of the testimony of Government witnesses Myer and Hall concerning certain subjects which the jury specified. With respect to Hall, the jury asked to hear his testimony concerning "[w]hat he told Dr. Rush as to what purpose

the money he wished to borrow (or borrowed) would be put." The jury indicated its wish to adjourn and hear the testimony at 9:30 A.M. on October 3. This request was granted.

The judge, counsel and the court reporter then retired to the judge's chambers to identify the testimony requested by the jury. During the course of this review, the following question and answer from Hall's direct examination were read by the reporter:

> Q. Can you recall any specific conversation between you and Dr. Rush about what the money had been used for?
>
> (Objection omitted)
>
> A. Yes.
>
> Q. Will you tell the ladies and gentlemen of the jury what specific conversation you recall?
>
> A. That we had in fact made a successful run to the Bahamas and brought in a little bit, enough to pay him and pay off the shop, and so forth. You know. That kind of talk, back—you know. But there was on long, lengthy—and the reason I says I didn't know, because I don't remember exactly *whether* we said it, you know. (Emphasis supplied)

After the conference in chambers the prosecutor went back to her office to talk to a DEA agent about their recollection of the testimony and to look at her notes. They agreed between themselves that the word actually used by Hall to introduce the final clause of his answer was not "whether" but "when"—a version decidedly more favorable to the prosecution's case. The next morning she went privately to ask the court reporter to review

his notes on this point. According to the account of their conversation that she later gave in court, he responded that he had already checked his notes and had discovered that he had erred the previous night in reading the word in question as "whether" rather than "when". Defense counsel was advised of the alleged mistake, and when the reporter read the testimony to the jury, he used the word "when".

After the reading, defense counsel sought an explanation of why the reporter had changed his interpretation of his notes. Following some off-the-record discussion the court ascertained that under the reporter's system the letters "WH" mean "when" and the letters "WHR" mean "whether". He asked the reporter what appeared in his notes, and the latter responded "when". In fact what appeared was "WHR" with the bottom part of the R almost entirely missing and the upper part much less strongly inked than in portions of the tape preceding or following the disputed symbol where R appeared alone or with other letters. What no one brought out, although this would have taken only a few seconds, is that the letters in question are so located on the keyboard that the reporter could have meant to type either "whether" or "when". The letters are arranged as follows:

H

W R

The W is produced by a stroke of the middle finger of the left hand. The H, when typed without the R, is produced by a stroke of the index finger of the left hand. To type the H and R in one symbol such as "WHR", the reporter strikes both letters simultaneously with his index finger,

the rows of keys being close enough together to permit his finger to bridge the gap between the two keys. The arrangement of the letters on the keyboard and the way in which they are supposed to be struck are seemingly consistent with two possibilities: One is that the reporter meant to strike only the H but that his index finger also caught the R; the other is that he meant to strike both the H and the R but that his single finger applied inadequate pressure to the R. The judge nevertheless announced that the reporter's statement was "dispositive of it, so far as I am concerned."

At 11:27 A.M. the court received a third note from the jury:

> Hall's testimony is becoming very crucial. Some of us seem to recall that in cross-examination he reversed himself and spicifically [sic] excluded Dr. Rush from the group that knew the use to which the borrowed money was to be put.
>
> We are willing to either listen to the entire testimony of Hall in cross-examination or listen to that portion which bears on the above point, whichever is more expeditious for all concerned.

A few minutes later the jury returned to the courtroom, and the reporter read Hall's entire cross-examination. When this reading was completed, the jury retired for further deliberations.

At this point defense counsel again called the judge's attention to the dispute concerning Hall's direct testimony. He recounted a conversation with the reporter in which the latter had admitted that he had no independent recollection whether "the word 'when' or 'whether' had

been used at the time that that transcript had been taken". Defense counsel also indicated that he had personally examined the reporter's notes and that an R was clearly visible. He requested that the jury be instructed that there might be a discrepancy as to this portion of Hall's testimony. The judge disposed of this motion as follows:

> The Court: Mr. Russell, in the course of your duties you certify transcripts to be read on appeal and for other purposes?
>
> The Reporter: Yes, your Honor.
>
> The Court: And I know of that, of course, of my own knowledge. If you were certifying that transcript, and part of it was the interpretation in the course of your duties, of the symbol that appears that's been questioned by Mr. Franzblau [defense counsel], what would it be?
>
> The Reporter: "When."
>
> The Court: That's sufficient for my purposes. I decline to instruct the jury.[1]

Shortly thereafter the jury requested a reading of "the balance of Hall's testimony in full—the direct and redirect." The testimony was read, again with "when" rather than "whether". When defense counsel objected on this and other grounds, the judge adhered to his earlier ruling, noting that shortly after the disputed answer there

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[1] The judge apparently was relying, as does the majority, on the provision in 28 U.S.C. § 753(b) stating that "[t]he transcript in any case certified by the reporter shall be deemed prima facie a correct statement of the testimony taken and proceedings had." Clearly this does not render the reporter's certification conclusive or authorize the judge to withhold knowledge of a genuine controversy from the jury.

was another where the same configuration of letters occurred but the context showed that the word clearly was "when". At 3:22 P.M. the jury returned a guilty verdict.

I see no sufficient reason for refusing to inform the jury that the reporter's notes did not clearly indicate whether Hall said "when" or "whether". The instruction requested by the defendant should have been given, with the judge adding, if so advised, that the reporter was convinced the word was "when" and that the jury should rely on its own recollection of the disputed testimony, much as jurors are typically instructed at the outset of their deliberations that their own recollections and not those offered by court or counsel should control. Putting aside the propriety of the prosecutor's approach to the reporter in the absence of defense counsel, I cannot accept the Government's argument (Brief, p. 17) that "there was no legitimate issue about the accuracy of the transcript as read to the jury and as certified on appeal in the transcript." In light of the reporter's admission that he had no independent recollection of the testimony, there would have been no legitimate issue only if "whether" made no sense in context or if there were evidence that the reporter was prone to making the error of lightly striking the R when he meant to strike only the H but that he rarely failed to apply adequate pressure to the R when he meant to strike both the R and the H. However, the "whether" makes sense, although not the sense the Government would like, and the only evidence on the reporter's habits was the single instance noted by the judge. The Government's version may have been somewhat more likely and advising the jury of the controversy would surely have made its task harder, but neither of these considerations afforded any justification for fore-

closing it from considering the dispute. In saying this I by no means take the position that every challenge to the accuracy of a transcript need be brought to the jury's attention. Here we have the reporter's original reading of his notes as "whether" rather than "when", the possibility that his change was influenced by the prosecutor's *demarche,* the ambiguity of the notes themselves, the ease with which a mistake could have been made, the reporter's lack of personal recollection, the apparent absence of any recollection by the judge, and his failure to make even the slightest inquiry as to the cause of the error. Moreover, the dispute concerned testimony on the crucial issue of the case—an issue on which the jury was so deeply disturbed as to seek reading of the testimony on three occasions.[2] When we add to this that the judge's instructions on the elements of conspiracy, which the majority charitably calls "colloquial", were singularly uninformative and barely pass muster, I consider this verdict to be, in the language of the British Criminal Appeal Act,

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[2] I cannot agree with my brothers that Hall's answer was not important because there was other evidence that Dr. Rush knew what the others were up to. As previously stated, the Government had to prove more than this. Moreover, Hall had admitted the fragility of his memory. It is still more impermissible to speculate that if Hall had said "whether", defense counsel would have pursued the issue further on cross-examination. In fact to do so would have been to make the common error of asking too much. I fear that my brothers have forgotten the admonitions in *Direct Sales* that the evidence of an intent to further "must be clear, not equivocal", 319 U.S. at 711, and in *Kotteakos* v. *United States,* 328 U.S. 750, 764 (1946), that whether error is harmless depends not on how it would have affected us but on what effect it "had or reasonably may be taken to have had upon the jury's decision." This was a seriously troubled jury and no testimony going to Dr. Rush's state of mind can be dismissed as unimportant.

Appendix A

§ 2, I Public General Acts and Measures of 1968, at 365, "unsafe and unsatisfactory". To use Lord Chief Justice Widgery's words, I am left with a "lurking doubt", *R.* v. *Cooper,* [1969] 1 Q.B. 267, whether Dr. Rush received the fair trial to which he was entitled. See also *Kotteakos* v. *United States, supra,* 328 U.S. at 764-65.

I would reverse for a new trial at which a better conspiracy charge would be given and there would be no doubt about Hall's testimony.

APPENDIX B

Judgment of the United States Court of Appeals for the Second Circuit

(Filed—March 20, 1981)

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the twentieth day of March one thousand nine hundred and eighty-one.

Present:

HON. HENRY J. FRIENDLY, SR.
HON. WILLIAM H. MULLIGAN
HON. WILLIAM H. TIMBERS
Circuit Judges

UNITED STATES OF AMERICA,

Appellee,

v.

MICHAEL A. RUSH,

Appellant.

No. 80-1446

Appeal from the United States District Court for the District of Connecticut

Appendix B

This cause came on to be heard on the transcript of record from the United States District Court for the District of Connecticut, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed in accordance with the opinion of this court.

A. Daniel Fusaro, Clerk

by Arthur Heller, Deputy Clerk

APPENDIX C

Order of the United States Court of Appeals Denying Petition for Rehearing

(Filed—April 27, 1981)

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 27th day of April, one thousand nine hundred and eighty-one.

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

MICHAEL A. RUSH,

Defendant-Appellant.

No. 80-1446

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the defendant-appellant, Michael A. Rush,

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED.

Appendix C

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge on the panel that heard the appeal and that no such judge has requested that a vote be taken thereon.

A. DANIEL FUSARO,
Clerk

APPENDIX D

Constitutional Provisions Involved

Criminal actions—Provisions concerning—Due process of law and just compensation clauses.—No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

APPENDIX E

Relevant Statutes Involved

Title 21, United States Code Section 841(a)

Prohibited Acts A—Unlawful Acts

(a) Except as authorized by the subchapter, it shall be unlawful for any person knowingly or intentionally—

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute or dispense, a controlled substance; or

(2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.

Title 21, United States Code Section 846

Attempt and Conspiracy

Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

Title 28, United States Code Section 753(b)

(b) One of the reporters appointed for each such court shall attend at each session of the court and at every other proceeding designated by rule or order of the court or by one of the judges, and shall record verbatim by shorthand or by mechanical means which may be augmented by electronic sound recording subject to regulations promulgated by the Judicial Conference: (1) all pro-

ceedings in criminal cases had in open court; (2) all proceedings in other cases had in open court unless the parties with the approval of the judge shall agree specifically to the contrary; and (3) such other proceedings as a judge of the court may direct or as may be required by rule or order of court or as may be requested by any party to the proceeding. The Judicial Conference shall prescribe the types of electronic sound recording means which may be used by the reporters.

The reporter shall attach his official certificate to the original shorthand notes or other original records so taken and promptly file them with the clerk who shall preserve them in the public records of the court for not less than ten years. An electronic sound recording of proceedings on arraignment, plea, and sentence in a criminal case, when properly certified by the court reporter, shall be admissible evidence to establish the record of that part of the proceeding.

The reporter shall transcribe and certify all arraignments, pleas, and proceedings in connection with the imposition of sentence in criminal cases unless they have been recorded by electronic sound recording as provided in this subsection and the original records so taken have been certified by him and filed with the clerk as hereinabove provided in this subsection. He shall also transcribe and certify such other parts of the record of proceedings as may be required by the rule or order of court. Upon the request of any party to any proceeding which has been so recorded who has agreed to pay the fee therefor, or of a judge of the court, the reporter shall promptly transcribe the original records of the requested parts of the proceedings and attach to the transcript his official certificate, and deliver the same to the party or judge making the request.

Appendix D

The reporter shall promptly deliver to the clerk for the records of the court a certified copy of any transcript so made.

The transcript in any case certified by the reporter shall be deemed prima facie a correct statement of the testimony taken and proceedings had. No transcripts of the proceedings of the court shall be considered as official except those made from the records taken by the reporter.

The original notes or other original records and the copy of the transcript in the office of the clerk shall be open during office hours to inspection by any person without charge.

TITLE 28, UNITED STATES CODE SECTION 2106

DETERMINATION

The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.